APPENDIX A

In the

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 18091

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

versus

DALLAS GENERAL DRIVERS, WAREHOUSEMEN AND HELPERS LOCAL UNION NO. 745,
Respondent.

Petition for Enforcement of an Order of the National Labor Relations Board, sitting at Washington, D. C.

(August 18, 1960.)

Before RIVES, Chief Judge, and CAMERON and BROWN, Circuit Judges.

PER CURIAM: The questions presented for decision are: (1) whether substantial evidence supports the Board's finding that the respondent union intended, by its picketing at construction projects, to induce work stoppages by em-

ployees of contractors other than Macatee, Inc. and thereby violated Section 8(b)(4)(A) of the National Labor Relations Act[1] and (2) whether the Board's order is too broad.

The Trial Examiner, after a two-day hearing, made findings of fact "upon the entire record in the case, including stipulations of the parties, and from my observation of the witnesses," which comprise thirty-five pages of the printed record. The Board adopted the findings of the Trial Examiner, and based its conclusion that the picketing of construction sites was for such unlawful objective upon the following:

> "(1) The primary employer, Macatee, had a permanent place of business where all its employees, including those not directly involved in the labor dispute with the Respondent Union, regularly reported, and where the Respondent Union could and did publicize its dispute to, and solicit the support of, Macatee's employees.[2] If the Respondent Union's object was only to seek the support of the primary employer's employees, there was no need for picketing the premises of neutral employers.

[1] Section 8(b)(4)(A) of the Act, as it was in effect during the events in this case, provides that it shall be an unfair labor practice for a labor organization or its agents—

> "* * * to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment * * * or to perform any services where an object thereof is: (A) forcing or requiring * * * any employer or other person * * * to cease doing business with any other person."

Section 8(b)(4) was amended in the Fall of 1959, and the provision applicable here was renumbered as Section 8(b)(4)(B). See Public Law 86-257, 1959.

[2] *Amarillo General Drivers, Warehousemen and Helpers Local Union No. 577, (Crowe-Gulde Cement Company)*, 122 NLRB No. 153.

"'(2) The Respondent Union's letter to employers in the construction industry in Dallas requesting them to cease doing business with Macatee until the labor dispute was settled.[3]

"(3) In many instances, employees of neutral employers quit work when Respondent Union's pickets appeared.[4]

"(4) On February 26 and 27, 1959, Respondent Union's pickets picketed the entire length of the John Deere property facing on Harry Hines Boulevard rather than limiting themselves to the area adjacent to the place where Macatee's employees were working on the project.[5] On February 25, 1959, Respondent Union's pickets continued picketing the Richardson project for 2 hours after the Macatee's and other employer's employees had ceased working and had left the job.

"In view of the foregoing, we find, as did the Trial Examiner, that Respondent Union violated Section 8(b)(4)(A) by its picketing at the construction sites of neutral employers.[6]

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[3] *Idem.* (In this case a substantially identical letter was held evidence of the respondent union's objective in engaging in secondary employer picketing. See fn. 4): *N.L.R.B. v. Associated Musicians*, 226 F. 2d 900, 904 (C. A. 2); *N.L.R.B. v. Denver Building and Construction Trades Council*, 193 F. 2d 421, 423-424 (C. A. 10).

[4] *Amarillo General Drivers, Warehousemen and Helpers, Local Union No. 577 (Crowe-Gulde Cement Company), supra.*

[5] *Amarillo General Drivers, Warehousemen and Helpers, Local Union No. 577 (Crowe-Gulde Cement Company), supra.*

[6] In affirming the conclusion of the Trial Examiner, we have not adopted his reasoning based on the supposed analogy to the *Otis Massey* case (109 NLRB 275, enf.den. 225 F. 2d (C. A. 5), cert. den. 350 U. S. 914). In *Otis Massey*, the circuit court refused to enforce the Board's decision because it felt that the Board had ignored evidence which it regarded as establishing that the respondent union was not picketing for an unlawful objective. The court later pointed out that in its *Otis Massey* decision the other employees of the primary employer at the common construction

(Continued on next page)

The recommendations of the Trial Examiner included the following:

> "* * * As this is not the first such violation in which the Respondent has engaged,[29] it may reasonably be expected that the Respondent will continue to commit similar violations in the future. Therefore the recommended order will not be limited only to the individual employers named herein, but instead will apply to any other employers as well.[30]

The Board's Order broadly required the respondent union to:

> "1. Cease and desist from engaging in, or inducing or encouraging employees of *employers other than Macatee, Inc.* to engage in a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is to force or require *any employer or other*

(Continued from preceding page)

situs picketed 'almost never came to the primary employer's principal situs, the warehouse,' and the criteria evolved by the Board in *Moore Drydock* (92 NLRB 547) 'were scrupulously observed.' *NLRB v. Truck Drivers and Helpers (National Trucking Co.)*, 228 F.2d 791, 796 (C. A. 5). See also *N.L.R.B. v. Associated Musicians*, 226 F. 2d 900, 906 (C. A. 2). In the present case, we rely for our finding of illegal objective not only on the fact that the primary employer had a permanent place of business where the Respondent Union could adequately publicize its dispute to all employees of the primary employer, including these not directly involved in the dispute, but also on the other evidence set forth above."

"[29] *Dallas General Drivers, Warehousemen & Helpers, etc. (Associated Wholesale Grocery of Dallas, Inc.)*, 118 NLRB 1251, enf. 43 LRRM 2696 (C. A. 5). See also *Dallas General Drivers, Warehousemen & Helpers, etc. (Hildebrand Warehouse Company)*, 111 NLRB 1313, where the Respondent complied with the Trial Examiner's recommended order.

"[30] *Local 926, International Union of Operating Engineers, AFL-CIO (Armco Drainage and Metal Products, Inc.)*, 120 NLRB 188, 189."

person to cease using, selling, handling, transporting, or otherwise dealing in the products of Macatee, Inc., or to cease doing business with that company *or any other company.*" (Emphasis supplied.)

and to post specified notices and make certain reports.

The respondent union makes no attack upon the findings of fact by the Trial Examiner, but earnestly insists that the record taken as a whole does not present a substantial basis of believable evidence pointing toward the unlawful motive. See *N.L.R.B. v. General Drivers, etc.*, 5 Cir., 1955, 225 F. 2d 205, 211; compare *N.L.R.B. v. Dan River Mills*, 5 Cir., 1960, 274 F. 2d 381, 385.

After carefully studying the record and considering the briefs and arguments, we find that the Board's finding is supported by substantial evidence for the reasons already adequately stated in the Board's decision. See also *Superior Derrick Corporation v. N.L.R.B.*, 5 Cir., 1960, 273 F. 2d 891.

As to the breadth of the Board's order, the Board's brief is silent. The Board failed to rule upon Exception #14 of the respondent union raising the point.[2] Upon the author-

[2] "Union excepts to the expansion of the order beyond the employers named in the Complaint to apply to all employers without limitation, for the reason that there is no pleading to support such order, for the further reason that respondent has never been notified that such order was sought nor had any opportunity to defend against such order, and for the further reason that there is no evidence to support such order. Said order is too broad and beyond the Board powers for the reasons set forth in the decision of the United States Court of Appeals for the Fifth Circuit in N.L.R.B. v. Ford Motor, 119 F. 2d 326 (C. A. 5, 1941) and N.L.R.B. v. Local 926 Operating Engineers, 267 F. 2d 418, 44 L.R.R.M. 2201 (C. A. 5, May 26, 1959), and Truck Drivers, etc. No. 728 v. N.L.R.B., 265 F. 2d 439."

ities cited by the respondent union in its exception (footnote 2, *supra*), and upon the recent Supreme Court decision in *Communication Workers, etc. v. N.L.R.B.*, U. S. No. 418, Oct. Term, 1959, m/s, decided May 2, 1960, 28 L.W. 4291, and our decision in *N.L.R.B. v. Local 926, etc.*, 5 Cir., 1959, 267 F. 2d 418, 421, we hold that that part of the order of the Board heretofore quoted is too broad and should be modified to read as follows:

> "1. Cease and desist from engaging in, or inducing or encouraging employees of *J. W. Bateson Company, Inc. or Gower & Folsom Construction Company* to engage in a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials or commodities or to perform any services, where an object thereof is to force or require *J. W. Bateson Company, Inc. or Gower & Folsom Construction Company* to cease using, selling, handling, transporting, or otherwise dealing in the products of Macatee, Inc., or to cease doing business with that Company."

As so modified the order of the Board is Enforced.

APPENDIX B

In the

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 18091

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

versus

DALLAS GENERAL DRIVERS, WAREHOUSEMEN AND HELPERS LOCAL UNION NO. 745,
Respondent.

Petition for Enforcement of an Order of the National Labor Relations Board, sitting at Washington, D. C.

(October 13, 1960.)

ON PETITION OF THE NATIONAL LABOR RELATIONS BOARD FOR REHEARING

Before RIVES, Chief Judge, and CAMERON and BROWN, Circuit Judges.

PER CURIAM: In the light of *IBEW Local 501 v. N.L.R.B.*, 1951, 341 U. S. 694, 705-706, it appears that in

that part of the order quoted in our original opinion the Board properly used the first two phrases which we italicized, viz.: (1) "employers other than Macatee, Inc.," (2) "any employer or other person." Only the final phrase of that part of the order should be stricken, viz.: "or any other company."

As so modified, the order of the Board is enforced. In other respects the petition for rehearing is denied.

APPENDIX C

(Original Filed—November 14, 1960)

United States Court of Appeals
FOR THE FIFTH CIRCUIT

18091

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

DALLAS GENERAL DRIVERS, WAREHOUSEMEN AND HELPERS LOCAL UNION NO. 745,
Respondent.

DECREE ENFORCING, AS MODIFIED, AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

Before: Rives, Chief Judge, and Cameron and Brown, Circuit Judges.

By the Court:

THIS CAUSE came on to be heard upon the petition of the National Labor Relations Board to enforce its order dated August 24, 1959. The Court heard argument of respective counsel on May 17, 1960, and has considered the briefs and transcript of record filed in this cause. On

August 18, 1960, the Court, being fully advised in the premises, handed down its opinion enforcing as modified, the Board's Order. Thereafter, pursuant to the Board's petition for rehearing filed September 6, 1960 and Respondent's opposition thereto, filed September 26, 1960, this Court on October 13, 1960, handed down its decision re-instating and enforcing certain provisions of the Board's order which had been deleted by the original decision of August 18, 1960. Accordingly, it is hereby

ORDERED, ADJUDGED AND DECREED by the United States Court of Appeals for the Fifth Circuit that Dallas General Drivers, Warehousemen and Helpers Local Union No. 745, its officers, representatives, agents, successors and assigns shall:

1. Cease and desist from engaging in, or inducing or encouraging employees of employers other than Macatee, Inc. to engage in a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is to force or require any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of Macatee, Inc., or to cease doing business with that company.

2. Take the following affirmative action which the Board has found will effectuate the policies of the Act:

(a) Post at its offices and at all other places where notices to members are customarily posted, copies of the

notice attached hereto marked "Appendix A." Copies of said notice to be furnished by the Regional Director for the Sixteenth Region, Fort Worth, Texas, shall, after being duly signed by an official representative of Respondent be posted immediately upon receipt thereof and be maintained for a period of sixty (60) consecutive days thereafter in conspicuous places, including all places where notices to members are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(b) Mail to the aforesaid Regional Director signed copies of said notice for posting at the plants and projects listed on Appendices B and C attached hereto the companies willing, in places where notices to employees are customarily posted.

(c) Notify the said Regional Director in writing, within ten (10) days from the date of this Decree, of the steps it has taken to comply therewith.

ENTERED: November 14, 1960

APPENDIX A

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A Decree of the United States Court of Appeals enforcing as modified, an order of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify you that:

WE WILL NOT engage in or induce or encourage employees of employers other than Macatee, Inc. to engage in a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is to force or require any employer or other person to cease using, selling, handling, transporting or otherwise dealing in the products of Macatee, Inc., or to cease doing business with that company.

DALLAS GENERAL DRIVERS, WAREHOUSEMEN AND HELPERS LOCAL UNION NO. 745

Dated By
(Representative) (Title)

This notice must remain posted for sixty (60) days from the date hereof, and must not be altered, defaced, or covered by any other material.

APPENDIX B

Boek Construction Company
Wm. H. LaDew Company
Russell Plumbing Company

Ed Hogan, d/b/a Hogan Plastering Contractor
American Roofing Company
Gotham Electric Company
Crisp & Vaughn

APPENDIX C

Richardson school project
John Deere project
Exchange Park project

Reserve Life Insurance project
DuBoise, Highway 75 project
Great Southwest Corporation project

APPENDIX D

124 NLRB No. 87 D-943
Dallas, Texas

DECISION AND ORDER

(Number and Title Omitted)

On June 5, 1959, Trial Examiner Sydney S. Asher, Jr. issued his Intermediate Report in the above-entitled proceeding, finding that the Respondent had engaged in and was engaging in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the copy of the Intermediate Report attached hereto. Thereafter the General Counsel, the Charging Party, and the Respondent filed exceptions to the Intermediate Report together with supporting briefs.

The Board[1] has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Intermediate Report, the exceptions, the briefs, and the entire record in the case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner with the following additions and modifications.

We agree with the Trial Examiner that Respondent Union, by its picketing at the construction sites of neutral

[1] Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its powers in connection with this case to a three-member panel.

employers, induced or encouraged employees of such neutral employers to discontinue work with an object of forcing or requiring the neutral employers to cease doing business with Macatee, Inc., the primary employer.

We base our conclusion that the picketing of construction sites was for such unlawful objective upon the following:

(1) The primary employer, Macatee, had a permanent place of business where all its employees, including those not directly involved in the labor dispute with the Respondent Union, regularly reported, and where the Respondent Union could and did publicize its dispute to, and solicit the support of, Macatee's employees.[2] If the Respondent Union's object was only to seek the support of the primary employer's employees, there was no need for picketing the premises of neutral employers.

(2) The Respondent Union's letter to employers in the construction industry in Dallas requesting them to cease doing business with Macatee until the labor dispute was settled.[3]

(3) In many instances, employees of neutral employers quit work when Respondent Union's pickets appeared.[4]

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[2] *Amarillo General Drivers, Warehousemen and Helpers Local Union No. 577 (Crowe-Gulde Cement Company)*, 122 NLRB No. 153.

[3] *Idem.* (In this case a substantially identical letter was held evidence of the respondent union's objective in engaging in secondary employer picketing. See fn. 4): *N.L.R.B.* v. *Associated Musicians*, 226 F. 2d 900, 904 (C. A. 2); *N.L.R.B.* v. *Denver Building and Construction Trades Council*, 193 F. 2d 421, 423-424 (C. A. 10).

[4] *Amarillo General Drivers, Warehousemen and Helpers, Local Union No. 577 (Crowe-Gulde Cement Company)*, *supra*.

(4) On February 26 and 27, 1959, Respondent Union's pickets picketed the entire length of the John Deere property facing on Harry Hines Boulevard rather than limiting themselves to the area adjacent to the place where Macatee's employees were working on the project. On February 25, 1959, Respondent Union's pickets continued picketing the Richardson project for 2 hours after Macatee's and other employer's employees had ceased working and had left the job.

In view of the foregoing, we find, as did the Trial Examiner, that Respondent Union violated Section 8 (b) (4) (A) by its picketing at the construction sites of neutral employers.[6]

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[5] *Amarillo General Drivers, Warehousemen and Helpers, Local Union No. 577 (Crowe-Gulde Cement Company), supra.*

[6] In affirming the conclusion of the Trial Examiner, we have not adopted his reasoning based on the supposed analogy to the *Otis Massey* case (109 NLRB 275, enf. den. 225 F. 2d (C. A. 5), cert. den. 350 U. S. 914). In *Otis Massey*, the Circuit Court refused to enforce the Board's decision because it felt that the Board had ignored evidence which it regarded as establishing that the respondent union was not picketing for an unlawful objective. The court later pointed out that in its *Otis Massey* decision the other employees of the primary employer at the common construction situs picketed "almost never came to the primary employer's principal situs, the warehouse," and the criteria evolved by the Board in *Moore Drydock* (92 NLRB 547) "were scrupulously observed." *N.L.R.B. v. Truck Drivers and Helpers (National Trucking Co.)*, 228 F. 2d 791, 796 (C. A. 5). See also *N.L.R.B.* v. *Associated Musicians*, 226 F. 2d 900, 906 (C. A. 2). In the present case, we rely for our finding of illegal objective not only on the fact that the primary employer had a permanent place of business where the Respondent Union could adequately publicize its dispute to all employees of the primary employer, including these not directly involved in the dispute, but also on the other evidence set forth above.

ORDER

Upon the entire record in the case, and pursuant to Section 10 (c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that Respondent Union, Dallas General Drivers, Warehousemen and Helpers Local Union No. 745, its officers, representatives, agents, successors and assigns, shall:

1. Cease and desist from engaging in, or inducing or encouraging employees of employers other than Macatee, Inc. to engage in a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport; or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is to force or require any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of Macatee, Inc., or to cease doing business with that company or any other company.

(2) Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Post at its offices and at all other places where notices to members are customarily posted, copies of the notice attached hereto marked "Appendix A." Copies of said notice to be furnished by the Regional Director for the

"In the event that the order is enforced by a decree of a United States Court Appeals, there shall be substituted for the words "PURSUANT TO A DECISION AND ORDER" the words "PURSUANT TO A DECREE OF THE UNITED STATES COURT OF APPEALS, ENFORCING AN ORDER."

Sixteenth Region, shall, after being duly signed by an official representative of Respondent Union, be posted immediately upon receipt thereof and be maintained for a period of sixty (60) consecutive days thereafter in conspicuous places, including all places where notices to members are customarily posted. Reasonable steps shall be taken by Respondent Union to insure that said notices are not altered, defaced, or covered by any other material.

(b) Mail to the Regional Director for the Sixteenth Region signed copies of said notice for posting at the plants and projects listed on Appendices B and C attached to the Intermediate Report, the companies willing, in places where notice to employees are customarily posted.

(c) Notify the Regional Director for the Sixteenth Region, in writing, within ten (10) days from the date of this Decision and Order, of the steps it has taken to comply herewith.

Dated, Washington, D. C. Aug 24 1959

Philip Ray Rodgers, Member

Stephen S. Bean, Member

John H. Fanning, Member
NATIONAL LABOR
RELATIONS BOARD

(SEAL)

APPENDIX A

NOTICE TO ALL EMPLOYEES

PURSUANT TO A DECISION AND ORDER

of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify you that:

WE WILL NOT engage in, or induce or encourage employees of employers other than MACATEE, INC. to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; where an object thereof is to force or require any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of MACATEE, INC. or to cease doing business with MACATEE, INC. or any other company.

DALLAS GENERAL DRIVERS, WAREHOUSEMEN AND HELPERS LOCAL UNION NO. 745

Dated By
(Representative) (Title)

This notice must remain posted for sixty (60) days from the date hereof, and must not be altered, defaced, or covered by any other material.